

Appl. No. : 10/066,513
Filed : January 30, 2002

REMARKS

In response to the Office Action mailed December 3, 2002, Applicant respectfully requests the Examiner to reconsider the above-captioned application in view of the following remarks. No new matter has been added and support for the amendments is provided in the original claims and throughout the specification.

Previous rejections under 35 U.S.C. §102(a)

The PTO rejected Claims 1, 3 – 5, and 9 – 14 under 35 U.S.C. §102(a) as allegedly being anticipated by Gehlsen (WO 00/40240). The Examiner states that Gehlsen (WO 00/40240) discloses and has claims drawn to a transmucosal delivery formulation comprising histamine compositions. The Examiner asserts that the Gehlsen reference renders the claims of the current application anticipated. Applicant respectfully disagrees.

To be anticipatory, a reference must each and every claim element is found in a single prior art reference. Furthermore, the reference must be accessible to the public. *Carella v. Starlight Archery*, 804 F.2d 135, 231 USPQ 644 (Fed. Cir. 1986); see also MPEP §2132. For a reference to anticipate the claims of the current application, it would need to have a publication date earlier than July 30, 1999, since the current application claims priority back to that date. The current application claims the benefit of priority from PCT/US00/20575, which claims the benefit of priority from Provisional Application No. 60/146,641, filed July 30, 1999. The reference cited by the Examiner, Gehlsen (WO 00/40240), was published on July 13, 2000, almost one year after the filing of the provisional from which the current case claims priority. Because the cited reference was published after the filing date of the present application, it is not available as an anticipatory reference. Therefore, Applicant respectfully requests withdrawal of the rejections of Claims 1, 3 – 5, and 9 – 14 under 35 U.S.C. §102(a).

Notwithstanding Applicants' position on this matter, Applicant has amended Claim 1 to incorporate the limitations of Claim 2. As discussed in the Office Action, the Gehlsen (WO 00/40240) reference does not teach the subject matter recited in former Claim 2.

Previous rejections under 35 U.S.C. §103(a)

The PTO has rejected Claims 1 – 17 under 35 U.S.C. §103(a) as being obvious in view of Gehlsen (WO 00/40240). As explained in the section above, the Gehlsen (WO 00/40240)

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reference cited by the Examiner, does not qualify as prior art under §102(a), as it was not publically available at the time the present invention was made. Thus the reference cannot be used to support a rejection of the claims of the current application under §103(a).

For the reasons detailed above, the Applicant therefore respectfully requests withdrawal of the rejections of the subject matter of Claims 1 – 17, under 35 U.S.C. §103(a).

Please charge any additional fees, including any fees for additional extension of time, or credit overpayment to Deposit Account No. 11-1410.

Respectfully submitted,

KNOBBE, MARTENS, OLSON & BEAR, LLP

Dated: 28 FEB 2003

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